

*a***KOH SIEW HOON****v.****MBf FINANCE BHD***b*

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[ORIGINATING MOTION NO: 25-22-1998
25 OCTOBER 1998]

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LAND LAW: *Sale of land - Auction - Auction price set by district land administrator - Whether below market price - Valuation report relied upon by district land administrator to set auction price - Whether report took into account existing state of property market*

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LAND LAW: *Sale of land - Order for - Appeal against order - Whether filed within time - National Land Code 1965, s. 418*

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The appellant mortgaged her land to the respondent and when she failed to service her loan, the respondent obtained an order for sale of her land from the district land administrator. Hence, the instant appeal by the appellant under s. 418 of the National Land Code 1965 ('NLC') and O. 55 r. 13 of the Rules of the High Court 1980 to set aside the order for sale of her land by public auction at RM940,000. The issues were: (i) whether the appellant filed her appeal within time; and (ii) whether based on the valuation report relied upon by the district land administrator the auction price was set far below the market price and that it should be at RM3,077,000 based on the valuation report relied upon by the appellant.

*f***Held:***g*

[1] In determining and ascertaining whether an appeal is filed within time under s. 418 NLC, it must be filed in the High Court within three months of a decision being communicated and not whether service of the originating motion is effected within the said three months. The decision of the land administrator to auction off the land was on 7 March 1998. This decision was communicated to the appellant on 10 April 1998. Three months from April 10 would be July 10. Thus, the appellant's appeal filed on 8 July 1998 was within time. The respondent's assertion that the district land administrator gave the appellant two weeks to file her appeal was contrary to s. 418(1) NLC.

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[2] The valuation report relied by the appellant did not take into account the existing state of the property market. It took into account sale transactions done during good times whereas the valuation report relied

by the district land administrator took into account bad periods which the property markets were experiencing. The courts are entitled to take judicial notice of the economic woes faced by developers in the country.

[2a] Both valuers took extra pains and laid out in the most lucrative and advantageous ways for the land to be disposed off. This court could, on the basis of their reports, decide which report should be preferred over the other (*Collector of Land Revenue v. Alagappa Chettiar*; *Collector of Land Revenue v. Ong Thye Eng*) and the valuation report relied upon by the district land administrator was preferred.

[3] It was rightly pointed out by the respondent that the auction price which the appellant proposed was too high and that there was every possibility that there would not be a ready buyer. As conceded by the appellant and accepted by the respondent, RM1 million was an acceptable reserved price.

[The decision of the district land administrator to auction land to remain.]

Case(s) referred to:

Bukit Rajah Rubber Co Ltd v. Collector of Land Revenue, Klang [1968] 1 MLJ 176 (refd)

Chuah Say Hai & Ors v. Collector of Land Revenue, Kuala Lumpur [1967] 2 MLJ 99 (refd)

Collector of Land Revenue v. Alagappa Chettiar; *Collector of Land Revenue v. Ong Thye Eng* [1971] 1 MLJ 43 (refd)

Eu Finance Bhd v. Sim Sen Organization Bhd [1990] 2 CLJ 554 (refd)

Hock Lim Estate Sdn Bhd v. Collector of Land Revenue, Johor Bahru [1980] 1 MLJ 210 (refd)

Kong Nen Siew v. Lim Siew Hong [1971] 1 MLJ 262 (refd)

Land Executive Committee of Federal Territory v. Harper Gilfillan Bhd [1981] 1 MLJ 234 (refd)

Lee Chow Meng v. PP [1976] 1 MLJ 287 (refd)

Lee Lip Ngee v. Crown Counsel [1974] MLJ 68 (refd)

Lee Weng Sang v. PP [1978] 1 MLJ 168 (refd)

Lim Kong v. PP [1962] MLJ 195 (refd)

Nanyang Manufacturing Co v. The Collector of Land Revenue Johore [1954] 20 MLJ 69 (refd)

Pang Ah Chee v. Chong Kwee Sang [1985] 1 MLJ 153 (refd)

Pembangunan Maha Murni Sdn Bhd v. Jururus Ladang Sdn Bhd [1986] 2 MLJ 30 (refd)

Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise [1979] 1 MLJ 135 (refd)

PP v. Choo Teck Heng [1960] MLJ 218 (refd)

Samivellu v. PP [1972] 1 MLJ 28 (refd)

- a** *Tractors Malaysia Bhd v. Kumpulan Pembinaan Malaysia Sdn Bhd* [1979] 1 MLJ 129 (*refd*)
United Malayan Banking Corporation Bhd & Anor v. Pemungut Hasil Tanah, Kota Tinggi [1984] 2 MLJ 87 (*refd*)
Yong Pak Yong v. PP [1959] MLJ 176 (*refd*)
- b** **Legislation referred to:**
National Land Code 1965, s. 418(1), (2)
Rules of the High Court 1980, O. 55 r. 13
For the mortgagor/appellant - Zanariah Che Cob; M/s Rugber Singh & Partners
For the mortgagee/respondent - Azlinda Zakariah; M/s K Sila Dass & Partners
- c** *Reported by Usha Thiagarajah*

JUDGMENT

Abdul Malik Ishak J:

- d** Koh Siew Hoon (“Koh”) as the mortgagor/appellant mortgaged her piece of land *vide* EMR 975 (GM 199), Lot 1275, Mukim Senai-Kulai comprising of 7 acres 0 rood 38 poles (“land”) to MBf Finance Berhad as the mortgagee/respondent (“MBf”). Koh failed to service her loan and it came up to RM439,909.38 inclusive of interest as set out in Form 16D dated 15 July 1997. MBf acted swiftly and obtained an order from the district land administrator in Kulai to auction off the land for RM940,000. Koh then filed the present originating motion (encl. 3) invoking s. 418 of the National Land Code 1965 (“NLC”) and O. 55 r. 13 of the Rules of the High Court 1980 (“RHC”) to set aside the order for sale of the land by public auction at RM940,000. By that originating motion in encl. 3, Koh also sought for the following orders:
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- (a) that the reserved price for the purpose of public auction of the land be amended from RM940,000.00 to RM3,077,000.00;
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- (b) that the public auction as ordered by the district land administrator be stayed to a date which the court deemed fit;
- (c) that the costs of the application be costs in the cause.
- The grounds to support the originating motion in encl. 3 were said to be:
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- (1) that the notice issued under section 254 of the NLC, particularly Form 16D, was defective;
- (2) the order for public auction of the land that emanated from a defective notice was bad in law;
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- (3) the reserved price set by the district land administrator was far below the market price; **a**
- (4) that the date for the hearing of the auction sale before the district land administrator was not conveyed to Koh; and
- (5) that the order for sale of the land by public auction dated March 7, 1998 was not served on Koh. **b**

Section 418 of the NLC enacts as follows:

- (1) Any person or body aggrieved by any decision under this Act of the [State Director], the Registrar or any [Land Administrator] may, at any time within the period of three months beginning with the date on which it was communicated to him, appeal therefrom to the Court. **c**
- (2) Any such appeal shall be made in accordance with the provisions of any written law for the time being in force relating to civil procedure; and the Court shall make such order thereof as it considers just. **d**
- (3) In this section ‘decision’ includes any act, omission, refusal, direction or order.

and on the strength of the case of *Land Executive Committee of Federal Territory v. Harper Gilfillan Bhd* [1981] 1 MLJ 234 FC, the appeal procedure provided for under s. 418 of the NLC is exclusive to itself. It is obvious that the three-month period within which the appeal must be made is inserted by the drafters of the Code for the purpose of preventing stale claims. It is important to note that in determining and ascertaining whether the appeal is filed within time under s. 418 of the NLC, one must take extreme care for it is the appeal which must be filed in the High Court within three months of a decision being communicated and not whether service of the originating motion is effected within the said three months’ period (*Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise* [1979] 1 MLJ 135). Sub-section (2) of s. 418 of the NLC empowers the High Court on any appeal to make such order “as it considers just” but this cannot be taken to mean that in every appeal the High Court has the jurisdiction to grant equitable relief in respect of the matter appealed against. The Privy Council in *United Malayan Banking Corporation Bhd & Anor v. Pemungut Hasil Tanah, Kota Tinggi* [1984] 2 MLJ 87 construed the phrase “... the court shall make such order thereon as it considers just” to mean any order considered to be just having regard to the substantive law, written or unwritten, regulating the subject matter of the appeal and this must surely necessitate an examination of the relevant substantive law to see whether or not it admits of the equitable jurisdiction sought for by the aggrieved party. It is pertinent to point out that the NLC is a complete and comprehensive code of law regulating the tenure of land in Malaysia and it **e**
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- a* must be emphasised that there is no room for the importation of any rules in English law unless the NLC expressly provides for it.

- b* Factually speaking the decision of the district land administrator to auction off the land was handed down on 7 March 1998 and the public auction of the land at the reserved price of RM940,000 was scheduled to take place on 16 April 1998. The decision of the district land administrator was communicated to Koh on the strength of the letter from her solicitors Messrs Rugber Singh & Partners that was addressed to the district land administrator which letter was exhibited in the affidavit in reply of Azlinda bt Zakariah in encl. 5 and marked as "AZ5". That letter bore the date 10 April 1998 and
- c* this must be the date when the decision of the district land administrator was communicated to Koh. For the purpose of computation of time under s. 418 of the NLC, it is crystal clear that time runs from the date of communication of the decision of the district land administrator to auction off the land by public auction, namely on 10 April 1998. Three months from 10 April 1998
- d* would end on 10 July 1998. Koh's appeal to the High Court under s. 418 of the NLC by way of an originating motion in encl. 3 was dated 8 July 1998 and filed on the same day. This meant that Koh's appeal was filed within time and squarely fall under s. 418(1) of the NLC. The assertion by Azlinda bt Zakariah in para. 12 of encl. 5 that the district land administrator gave Koh
- e* two weeks to file her appeal was certainly contrary to s. 418(1) of the NLC and should be ignored.

- Initially Puan Zanariah Che Cob, learned counsel for Koh, argued that her client did not receive the notice of default in Form 16D but after hearing the submissions of Puan Azlinda bte Zakariah, learned counsel for MBf, the matter
- f* was adjourned on the request of the parties. On the next hearing date, Puan Zanariah Che Cob was magnanimous enough and she conceded that the decision of the land administrator in ordering the auction of the land on 7 March 1998 was beyond reproach. Puan Zanariah Che Cob's main concern was that the reserved price for the public auction of the land should be
- g* RM3,077,000 and not RM940,000. Later Puan Zanariah Che Cob submitted that her client agreed to a lesser figure of RM2,000,000. Puan Azlinda bte Zakariah drew my attention to an additional affidavit that was affirmed by her on 10 September 1998 as reflected in encl. 7, and there she deposed that the district land administrator relied on the valuation report from CH Williams
- h* Talhar & Wong to arrive at a figure of RM940,000 being the auction reserve price for the land. In fact the valuation report from CH Williams Talhar & Wong was enclosed and marked as "AZ1" to encl. 7. That valuation report makes for interesting reading. The land was described as agricultural with a freehold status located to the interior portion more to the east of Seelong New
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Village. The land was inspected on 11 February 1998 and that was also the date of the valuation. The land was said to be accessible from the Senai Airport road via the Seelong/Kempas old road. The immediate locality was said to be generally agricultural in character and the surrounding lands were mostly small holdings planted with rubber trees, oil palms and vegetables. However, there were other residential schemes within the locality namely Taman Senai Baru, Taman Senai Jaya, Taman Mewah and Taman Sempena. The nearest local centre for the locality was said to be Senai town, located some 12 kilometres to the west. Senai town is said to be the main commercial and administrative centres for the Mukim. Senai town is served by several rows of temporary and modern shophouses, police station, petrol kiosks and schools. The valuation report from CH Williams Talhar & Wong showed that a check was made with the registered document of title at the Kulai land office on 16 February 1998 and it revealed the nature of the cultivation to be oil palm with Koh as the registered owner holding 1/1 share thereto. The land too was charged to MBf and a private caveat binding the land was entered by Ng Chor Yong *vide* presentation no: 407/97 caveat vol. 14 folio 13 dated 17 October 1997. The land was said to be quadrilateral in shape with an undulating terrain and a small stream running through it. The site boundaries of the land were not demarcated by any form of fencing. At the date of inspection, the land was planted with old oil palms and it was not maintained. The comparison method was adopted by CH Williams Talhar & Wong to value the land. Recent sales of comparable properties in and around the locality were referred to with adjustments made for location, size, shape of land, accessibility, tenure, title restrictions and other relevant characteristics in order to arrive at the open market value. Due accord too was made in regard to the existing state of the property market in general and the agricultural sector in particular. Transactions of agricultural small holdings in the vicinity have indicated values ranging from RM400,000 to RM500,000 per hectare depending on those factors enumerated above. The sale transactions of Lots 1259, 1252, 1228, 494 and 390 all located at Seelong transacted between 27 March 1997 to 4 November 1997 were used as comparables. With all these in mind, CH Williams Talhar & Wong assessed the auction reserve price of the land free from all encumbrances to be RM940,000. Indeed the valuation report prepared by CH William Talhar & Wong was unlike the valuation report in the case of *Eu Finance Bhd v. Sim Sen Organization Bhd* [1990] 2 CLJ 554, where Abdul Razak J castigated the valuer for preparing a useless valuation report without setting out the comparables.

A second bite at the cherry, so to speak, was accorded to Koh. On 13 May 1998, the parties appeared once again before the district land administrator as reflected at para. 9 of encl. 5 and the district land administrator refused to

- a** budge from the auction price which he had ordered on 7 March 1998, which was RM940,000.

Koh relied on the valuation report prepared by Henry Butcher where two comparables were relied upon.

- b** One was Lot 1274 with an area of 7.18125 acres located off Jalan Kampong Seelong which was transacted on 26 October 1995 for RM2,909,700. The other was lot 1275 comprising of 7.2375 acres located off Jalan Kampong Seelong and transacted in April 1996 for RM3,783,186. Both these two comparables were agricultural and zoned as residential with freehold status. Henry Butcher
- c** gave the current market value of the land free from all other encumbrances and with vacant possession to be RM4,103,000. The forced sale value was listed to be RM3,077,000. Two things must be highlighted in regard to the valuation report prepared by Henry Butcher:

- d** (1) Henry Butcher did not take into account the existing state of the property market in general and the agricultural sector in particular. CH Williams Talhar & Wong, on the other hand, took this into account.

- e** (2) The two comparables adopted by Henry Butcher were for sale transactions done during the good times – 26 October 1995 and April 1996. CH Williams Talhar & Wong, on the other hand, took into account the comparables for periods between 27 March 1997 to 4 November 1997 which were bad periods as the property markets were experiencing bad times. Indeed courts are entitled to take judicial notice of the economic woes faced by developers in the country. The law journals are replete with authorities on judicial notice. Suffice for this exercise to cite a few of them:
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(a) *Pembangunan Maha Murni Sdn Bhd v. Jururus Ladang Sdn Bhd* [1986] 2 MLJ 30;

- g** (b) *Pang Ah Chee v. Chong Kwee Sang* [1985] 1 MLJ 153 FC;

(c) *Lee Weng Sang v. PP* [1978] 1 MLJ 168 FC;

(d) *Lee Lip Ngee v. Crown Counsel* [1974] MLJ 68;

- h** (e) *Samivellu v. PP* [1972] 1 MLJ 28;

(f) *Lee Chow Meng v. PP* [1976] 1 MLJ 287;

(g) *Lim Kong v. PP* [1962] MLJ 195;

- i** (h) *Yong Pak Yong v. PP* [1959] MLJ 176;

- (i) *PP v. Choo Teck Heng* [1960] MLJ 218;
- (j) *Tractors Malaysia Bhd v. Kumpulan Pembinaan Malaysia Sdn Bhd* [1979] 1 MLJ 129 FC; and
- (k) *Kong Nen Siew v. Lim Siew Hong* [1971] 1 MLJ 262.

Both the valuers took extra pains and laid out in the most lucrative and advantageous ways for the land to be disposed off (*Nanyang Manufacturing Co. v. The Collector of Land Revenue Johore* [1954] 20 MLJ 69; *Chuah Say Hai & Ors v. Collector of Land Revenue, Kuala Lumpur* [1967] 2 MLJ 99; *Bukit Rajah Rubber Co. Ltd v. Collector of Land Revenue, Klang* [1968] 1 MLJ 176; and *Hock Lim Estate Sdn Bhd v. Collector of Land Revenue, Johor Bahru* [1980] 1 MLJ 210 FC). It is germane at this juncture to cite passages in the judgment of Lord Diplock in *Collector of Land Revenue v. Alagappa Chettiar*; *Collector of Land Revenue v. Ong Thye Eng* [1971] 1 MLJ 43 PC at p. 44 which surely must apply to the factual matrix in this case:

Similarly where expert oral evidence of valuers has been called at the trial and discloses a conflict of opinion between them, the judge's findings as to which he regarded as most reliable is entitled to considerable weight though it is less sacrosanct than his findings of pure fact which are dependent upon his view of whether or not particular witnesses were telling the truth. Finally, their Lordships would observe that land valuation inevitably involves an element of appreciation and impression. There is room for divergence of opinion.

The valuers from Henry Butcher and CH Williams Talhar & Wong did not give oral evidence but this court could on the basis of their reports decide which report should be preferred over the other. For the reasons highlighted earlier, I have no hesitation whatsoever to prefer the valuation report of CH Williams Talhar & Wong notwithstanding the fact that the present case was not a land acquisition matter.

Puan Azlinda bte Zakariah rightly pointed out that the auction price which Koh proposed was too high and there was every possibility that there would not be a ready buyer. She submitted that as at 18 September 1998, the arrears of instalments incurred by Koh amounted to RM494,032.13 and it was this amount that MBf was interested in. Puan Zanariah Che Cob was quite truthful and took a bold action when she conceded that RM1 million was an acceptable reserved price for the land even though her client was not receptive to that figure. Puan Azlinda bte Zakariah, on the other hand, announced in court that MBf was ever willing to accept RM1 million as the reserved price for the land. All these magnanimous gestures shortened the hearing of the originating motion. In the final analysis, I ordered the following:

- a* (1) that the decision of the district land administrator dated 7 March 1998 to auction the land to the public to remain;
- (2) the reserved price be at RM1 million;
- b* (3) the public auction to proceed forthwith at the Kulai land office on 3 December 1998; and
- (4) there be no order as to costs.
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